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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 KAI WEAVER, on Behalf of Herself and all  
10 Others Similarly Situated,

11 Plaintiff,

12 v.

13 AETNA LIFE INSURANCE COMPANY and  
14 WESTERN INSURANCE SPECIALITIES,

15 Defendants.

3:08-CV-00037-LRH-VPC

ORDER

16 In this case, Plaintiff Kai Weaver, on behalf of herself and all others similarly situated,  
17 seeks restitution of premiums she and others paid to Defendants Aetna Life Insurance Company  
18 (“Aetna”) and Western Insurance Specialities (“Western”). Plaintiff grounds this request for relief  
19 upon Defendants alleged illegal behavior in providing life insurance policies. Because Plaintiff  
20 lacks standing to bring the claims asserted in counts one through three of her complaint, and she  
21 fails to state a claim in counts four through six, the court grants Defendants’ present motions to  
22 dismiss (#13<sup>1</sup> & #14).

23 **I. Facts and Procedural History**

24 In 2004, Defendants Aetna and Western agreed Aetna would take over a group life  
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26 <sup>1</sup>Refers to the court’s docket

1 insurance policy previously issued by Hartford. Aetna would provide the insurance while Western  
2 would provide for the policy's administration. The policy purported to insure the lives of various  
3 employees and retirees and their eligible spouses and children within the Public Employees'  
4 Retirement System of Nevada ("PERSN") and the University and Community College System of  
5 Nevada ("UCCSN"). Aetna and Western did not disclose to any insureds that the life insurance was  
6 being transferred from Hartford to Aetna.

7 Aetna and Western have represented that the policyholder of the PERSN policy was the  
8 Public Employees Voluntary Life Plan and that the policyholder of the UCCSN policy was the  
9 University and Community College System of Nevada Voluntary Life Plan. Aetna and Western  
10 also represented that the effective date of these policies was September 1, 2004, and that both  
11 policies were issued and delivered to the designated policyholder. However, from September 2004  
12 through mid-December 2006, Aetna did not write a group life insurance policy for the PERSN and  
13 UCCSN group policies or issue individual certificates of insurance to the insureds. In fact, the  
14 purported group policyholders, Public Employees' Voluntary Life Plan and the University and  
15 Community College System of Nevada Voluntary Life Plan, did not exist. Aetna and Western  
16 received at least \$11 million in premiums from sale of the policies.

17 Plaintiff Kai Weaver was formerly employed as a Deputy Sheriff for Douglas County,  
18 Nevada. During this employment, she purchased life insurance from Aetna and Western as a  
19 member of PERSN. Plaintiff purports to bring this action on behalf of herself and as a  
20 representative of a class of similarly situated persons. This class includes those who made  
21 payments to Aetna and Western for a group policy that was to be issued to PERSN and UCCSN.  
22 Plaintiff excludes from the class "all beneficiaries or other persons who received any payment from  
23 [Western] or [Aetna] arising from a claim for insurance benefits." In her First Amended  
24 Complaint, Plaintiff asserts six counts: (1) Breach of Fiduciary Duty, (2) Civil Conspiracy, (3)  
25 Unjust Enrichment, (4) Negligence, (5) Violation of Nevada's Racketeering Statutes, and (6)  
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1 Deceptive Trade Practices.

## 2 **II. Discussion**

### 3 **A. Standing**

4 Both Defendants Aetna and Western move for dismissal on the basis that Plaintiff lacks  
5 standing to bring this action. Consideration of standing as a threshold matter is appropriate, as  
6 standing goes to this court's jurisdiction to hear this matter under Article III of the United States  
7 Constitution.

8 In *Lujan v. Defenders of Wildlife*, the Supreme Court set forth the constitutionally required  
9 elements of standing:

10 First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally  
11 protected interest which is (a) concrete and particularized and (b) actual or imminent, not  
12 "conjectural" or "hypothetical" . . . . Second, there must be a causal connection between  
13 the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the  
challenged action of the defendant, and not . . . th[e] result [of] the independent action  
of some third party not before the court. Third, it must be "likely," as opposed to merely  
"speculative," that the injury will be redressed by a favorable decision.

14 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted). "The party invoking  
15 federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. Since Defendants  
16 challenge Plaintiff's standing in a motion to dismiss, general factual allegations of injury resulting  
17 from Defendants' conduct may suffice, because this court presumes that general allegations  
18 embrace those specific facts that are necessary to support a claim. *See id.*

19 Because Plaintiff asserts six counts in her first amended complaint—and correspondingly six  
20 claims for relief—Plaintiff must demonstrate standing for each claim she seeks to press. *See*  
21 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). This court will consider counts one  
22 through three—(1) breach of fiduciary duty, (2) civil conspiracy, and (3) unjust enrichment—before  
23 considering counts four through six—(4) negligence, (5) violation of Nevada's Racketeer Influenced  
24 and Corrupt Organizations ("RICO") statutes, and (6) violation of Nevada's Deceptive Trade  
25 Practices Act.

1                   **1.       Counts One Through Three**

2           Each of the claims Plaintiff asserts within counts one through three centers upon her  
3 allegation that she was injured by paying premiums for a nonexistent or illegal insurance policy.  
4 (*See also* Opp’n to Mot. to Dismiss (#18) at 15) (“[Plaintiff’s] injury in fact is the payment of  
5 premium for coverage under a group insurance policy that did not exist.”). Of course, an economic  
6 injury is sufficient to satisfy the Article III standing requirement of injury-in-fact. *See Clinton v.*  
7 *City of New York*, 524 U.S. 417, 432-33 (1998). This observation does not dispose of the issue,  
8 however. For instance, a consumer could claim she experienced an injury of five dollars in the  
9 purchase of a widget. But this claim begs the question of what the consumer received in return.  
10 That is, did the consumer fail to receive the widget, or did she receive exactly what she bargained  
11 for? If the consumer received the bargained-for widget, she could not claim a cognizable injury  
12 under Article III.

13           The United States District Court for the Central District of California considered a similar  
14 claim in *Impress Communications v. Unumprovident Corp.*, 335 F. Supp. 2d 1053 (C.D. Cal.  
15 2003). In *Impress*, two plaintiffs filed a class action against a number of defendants for defrauding  
16 plaintiffs into joining group and individual disability insurance plans. *Id.* at 1055-56. The  
17 plaintiffs claimed the defendants did not intend to provide the coverage as promised in the plans.  
18 *Id.* at 1056. In support of this allegation, the plaintiffs claimed the defendants engaged in unlawful  
19 and wrongful acts, including (1) instituting goals for cost savings through denial of claims, (2)  
20 providing financial incentives for doctors to deny claims, (3) implementing bonus plans rewarding  
21 company management for denying as many claims as possible, and (4) employing practices that  
22 pressure claims handlers to deny claims without giving them a proper review. *Id.* Critically,  
23 however, the plaintiffs did not allege that they filed claims under the policies or that they were  
24 denied any benefits. *Id.* at 1055-56. Nevertheless, the plaintiffs sought damages, restitution,  
25 disgorgement of profits, injunctive relief, and attorneys’ fees. *Id.* at 1056. The court held that the  
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1 plaintiffs failed to allege an Article III injury because they did not allege that they had been  
 2 provided with less coverage than they contracted for. *Id.* at 1059. The court found that “[a]n  
 3 allegation that [the defendants’] administration of the plan might result in denial of future benefits  
 4 is purely speculative” and did not suffice to confer standing on the plaintiffs. *Id.*

5 Similarly here, while counts one through three allege Plaintiff paid premiums for a  
 6 nonexistent policy—seemingly an injury-in-fact—one could not deem a policy nonexistent unless she  
 7 were improperly denied benefits. Any other claim of a “nonexistent” policy ventures into the  
 8 metaphysical, as one cannot know whether a policy exists until availing oneself of its benefits.  
 9 Plaintiff faces this dilemma while seeking to distinguish *Impress*:

10 The *Impress* Plaintiffs . . . did not suffer an injury-in-fact because they never filed claims  
 11 under the policies or were denied any benefits sought. However, in this case, Ms.  
 12 Weaver alleges that no group life policy was legally formed. Thus, the allegations  
 concern the formation of the contract. If a group insurance policy was not formed, the  
 remedy available is a return of the premium.

13 (Supp. to Opp’n to Def.’s Mot. to Dismiss (#30) at 3.) Plaintiff’s argument fails to show she has  
 14 experienced an injury-in-fact because, by paying premiums, she was not bargaining for the  
 15 “formation of the contract.” Rather, any contract formation between Plaintiff and Defendants  
 16 would have been accomplished by payment of premiums in return for a promise of benefits.<sup>2</sup>

17 Plaintiff also makes various references to an illegal contract in her complaint. Indeed,  
 18 Plaintiff alleges Defendants failed to comply with requirements imposed by Nevada Revised  
 19 Statutes concerning insurance policies. In certain circumstances, restitution is warranted from the  
 20 recipient of performance under an illegal contract. *See* Restatement (Third) of Restitution & Unjust  
 21 Enrichment § 32 (2004). The appellation “illegal” here is misleading, however, because not all  
 22 contracts are unenforceable by reason of an illegality. *See* Restatement (Second) of Contracts § 178  
 23 (1981). More importantly, Plaintiff has not alleged that any court has refused to compel

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 25 <sup>2</sup>Whether the parties have an enforceable contract is not before this court, as Plaintiff is not contending  
 26 any performance from Defendants is due.

Defendants' performance on the basis that the parties entered into an illegal contract. Plaintiff has therefore failed to show an injury-in-fact as to counts one through three.<sup>3</sup>

## 2. Counts Four Through Six

In counts four through six of the first amended complaint—which assert claims for negligence, violation of Nevada's RICO statutes, and deceptive trade practices—Plaintiff claims Defendants made various misrepresentations concerning its insurance policies. In support of these allegations, Plaintiff contends Defendants sold policies using a document called "HIGHLIGHTS OF THE PLAN," which indicates,

This brochure is only a brief description of benefits and not a contract of insurance. Terms of coverage are set forth in the Master Group Policy issued to P.E.R.S. [or UCCSN] by Aetna Life Insurance Company.

(First Am. Compl. (#1) Ex. A at 5.) As stated previously, Plaintiff alleges Defendants knew there was no Master Group Policy issued to PERSN or UCCSN. The court concludes these allegations are sufficient at the pleading stage to show Plaintiff suffered an injury-in-fact. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (finding an injury-in-fact when the plaintiff received false information concerning whether certain apartments were available for rent).

### B. Failure to State a Claim

The court's finding of injury-in-fact as to counts four through six does not end the matter, however. Aetna has also moved to dismiss counts four through six on the basis that Plaintiff fails to state a claim under Federal Rule of Civil Procedure 12(b)(6).

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wylar Summit P'ship v.*

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<sup>3</sup>Plaintiff also lacks standing to assert injunctive relief for her claims within counts one through three. To seek injunctive relief she must show she "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal quotation marks omitted). For the same reasons Plaintiff has not alleged an injury arising from Defendants' past actions, Plaintiff's allegations do not show Defendants' alleged illegal behavior poses an real and immediate threat of injury to her interests as an insured.

1 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court  
2 does not necessarily assume the truth of legal conclusions merely because they are cast in the form  
3 of factual allegations in a plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d  
4 752, 754-55 (9th Cir. 1994).

5 There is a strong presumption against dismissing an action for failure to state a claim. *See*  
6 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "The issue is  
7 not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence  
8 in support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other*  
9 *grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). However, a plaintiff's obligation to  
10 provide the grounds of her entitlement to relief requires more than labels, conclusions, and a  
11 formulaic recitation of the elements of the cause of action. *Bell Atlantic Corp. v. Twombly*, 127  
12 S.Ct. 1955, 1965 (2007). "Factual allegations must be enough to raise a right to relief above the  
13 speculative level on the assumption that all the allegations in the complaint are true (even if  
14 doubtful in fact)." *Id.* (internal citations omitted).

15 **1. Count Four**

16 Defendants argue Plaintiff fails to state a claim in count four, a negligence claim, because  
17 she does allege any damages. The court agrees. Damages is an essential element of a negligence  
18 claim. *See Szekeres v. Robinson*, 715 P.2d 1076, 1079 (Nev. 1986). For the same reasons Plaintiff  
19 has not shown an Article III injury with respect to counts one through three, Plaintiff has also not  
20 claimed any damages due to Defendants' conduct.

21 **2. Count Five**

22 Defendants also move for dismissal of Plaintiff's Nevada RICO claim, arguing Plaintiff has  
23 not shown an injury within the meaning of Nevada Revised Statutes section 207.470(1). That  
24 subsection states, "Any person who is injured in his business or property by reason of any violation  
25 of [Nevada's RICO statute] has a cause of action against a person causing such injury for three  
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1 times the actual damages sustained.” Nev. Rev. Stat. § 207.470. The court agrees that Plaintiff has  
 2 failed to state a civil RICO claim.

3 Nevada courts have interpreted the Nevada’s RICO statute consistently with the provisions  
 4 of the federal RICO statute. *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 71 (9th Cir. 1994); *see also*  
 5 *Allum v. Valley Bank of Nev.*, 849 P.2d 297, 298 n.2 (Nev. 1993) (noting that Nevada’s RICO  
 6 statutes are patterned after the federal RICO statutes). As such, Plaintiff must show a harm to a  
 7 specific business or property interest in order to state a claim. Again, for the reasons noted in this  
 8 court’s analysis with respect to Plaintiff’s standing as to counts one through three, Plaintiff has  
 9 failed to do so. *See also Maio v. Aetna, Inc.*, 221 F.3d 472, 488 (3d Cir. 2000) (holding that the  
 10 plaintiff failed to state an injury under the federal RICO statutes because she did not suffer a  
 11 financial loss resulting from the defendants’ allegedly inferior HMO plan).

### 12 **3. Count Six**

13 Finally, Defendants argue Plaintiff cannot recover under Nevada’s Deceptive Trade Practice  
 14 Act because she is not a “victim” within the meaning of Nevada Revised Statutes section 41.600.  
 15 Nevada Revised Statutes section 41.600 provides, “An action may be brought by an person who is  
 16 a victim of consumer fraud. As used in this section, ‘consumer fraud’ means: . . . A deceptive trade  
 17 practice as defined in NRS 598.0915 . . .” The term “victim” in section 41.600 is not defined.  
 18 Moreover, no Nevada case law has ventured to offer a definition. Therefore, this court must predict  
 19 how the Nevada Supreme Court would decide this issue “using intermediate appellate court  
 20 decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.”  
 21 *Arizona Elec. Power Co-op v. Berkely*, 59 F.3d 988, 991 (9th Cir. 1995).

22 Although not addressing section 41.600, the Nevada Supreme Court has defined “victim” as  
 23 the term is used in Nevada Revised Statutes section 176.033(c), which authorizes restitution for a  
 24 crime victim. The court addressed the issue in *Igbinovia v. State*, 895 P.2d 1304 (Nev. 1995),  
 25 where it held that the Las Vegas Metropolitan Police Department was not a “victim” that could  
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1 receive restitution for money used to purchase illegal drugs in a sting operation. *Id.* at 1039. While  
2 noting the term was undefined, the court found that “the word ‘victim’ has commonly-understood  
3 notions of passivity, where the harm or loss suffered is generally unexpected and occurs without the  
4 voluntary participation of the person suffering the harm or loss.” *Id.* at 1038. Of course, in the  
5 present case, whether Plaintiff was passive in her interactions with Defendants is not in issue.  
6 Nonetheless, the *Igbinovia* court’s definition of “victim” is still significant because of its inclusion  
7 of the terms “harm or loss,” which connote that a victim must experience some damage as a result  
8 of an offender’s actions.

9 Here, Plaintiff has made no such allegation. She does not allege that she was induced to  
10 participate in Defendants’ policy after reading the “HIGHLIGHTS OF THE PLAN” document or  
11 that she was otherwise harmed by the absence of the Master Group Policy referenced in the  
12 document. Accordingly, the court concludes that Plaintiff has not raised a right to relief above the  
13 speculative level and has therefore failed to state a claim. Aetna’s motion to dismiss counts four  
14 through six pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted.

### 15 C. Leave to Amend

16 Defendants have asked this court to dismiss Plaintiff’s complaint with prejudice, arguing  
17 that any amendment would be futile. The court is unsure how Plaintiff could amend her complaint  
18 to remedy its current defects. However, upon the current record the court cannot say as a matter of  
19 law that it is clear that the complaint could not be saved by amendment. *See Gompper v. VISX,*  
20 *Inc.*, 298 F.3d 893, 898 (9th Cir. 2002). Accordingly, the court will dismiss the first amended  
21 complaint without prejudice.

### 22 III. Conclusion

23 With respect to Plaintiff’s claims for breach of fiduciary duty, civil conspiracy, and unjust  
24 enrichment, Plaintiff has failed to show she suffered an injury-in-fact that would confer standing  
25 under Article III of the Constitution. In regard to Plaintiff’s claims for negligence, violation of  
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1 Nevada's RICO statute, and deceptive trade practices, she has failed to state to a claim upon which  
2 relief can be granted. Defendants' motions to dismiss are therefore granted.

3 IT IS THEREFORE ORDERED that Defendant Western's Motion to Dismiss (#13) is  
4 GRANTED.

5 IT IS FURTHER ORDERED that Defendant Aetna's Motion to Dismiss (#14) is  
6 GRANTED.

7 IT IS FURTHER ORDERED that Plaintiff's Motion to Certify Class (#23) is DENIED as  
8 moot.

9 IT IS SO ORDERED.

10 DATED this 3rd day of November, 2008.



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13 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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